RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUN 17 2017
OFFICE OF THE CLERK

No. 16-424

In the Supreme Court of the United States

RODNEY CLASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to challenge the constitutionality of his statute of conviction on appeal, notwithstanding his entry of an unconditional guilty plea in which he did not seek to preserve any right to pursue such a challenge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter. The district court's oral order denying petitioner's motion to dismiss the indictment (Pet. App. 6a-9a) is unreported. The district court's opinion and order deferring in part and denying in part petitioner's motion to dismiss the indictment (Pet. App. 10a-16a) is reported at 38 F. Supp. 3d 19.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2016. The petition for a writ of certiorari was filed on September 30, 2016, and the petition was granted on February 21, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Criminal Procedure 11(a)(2) provides:

> *Conditional plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

STATEMENT

Following a guilty plea in the United States District Court for the District of Columbia, petitioner was convicted on one count of unlawfully carrying and having readily accessible a firearm on Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1). C.A. App. 165. He was sentenced to 24 days of imprisonment, to be followed by 12 months of supervised release. *Id.* at 166-167. The court of appeals affirmed. Pet. App. 1a-5a.

1. Shortly before noon on a weekday, petitioner parked his Jeep in a permit-only parking lot on "the 200 block of Maryland Avenue, SW, Washington, D.C., which is part of the Capitol Grounds." J.A. 24; see Gov't C.A. Br. 5. That parking lot, which petitioner chose for its proximity to congressional office buildings, is reserved for employees of the House of Representatives. Gov't C.A. Br. 5. The parking lot had signs warning that it was open only to permit-holders, and street barriers, a guard station, and other indicators of restricted access were visible. *Ibid.*; see Pet. Br. 6.

After parking there, petitioner walked to the Capitol and to the House and Senate office buildings in order to have paperwork appointing him a "Private Attorney General" stamped at the offices of various committees

and Members of Congress. Gov't C.A. Br. 5. While petitioner was inside, an agent of the United States Capitol Police noticed that his Jeep was parked in the employees-only lot without a permit. *Id.* at 6. Through the Jeep's side windows, the agent saw what appeared to be a large blade and a gun holster. *Ibid.*; J.A. 24. She called for backup. Gov't C.A. Br. 6. She also ran a background check on the Jeep, discovering that it was registered to petitioner. *Ibid.*

About two hours after he had arrived, petitioner emerged from the Capitol and returned to the restricted lot. Gov't C.A. Br. 6. When the Capitol Police intercepted him, he admitted that he was the owner of the Jeep and that the Jeep contained weapons. *Ibid.* After he withdrew his initial consent for a search of the Jeep, the officers obtained a search warrant. *Id.* at 6-7. The search uncovered, *inter alia*, a 9mm Ruger pistol loaded with eight rounds, including one round in the chamber; several loaded magazines containing 35 additional 9mm rounds; a box of 50 additional 9mm rounds; a .44 caliber Taurus pistol loaded with seven rounds, including one round in the chamber; an additional 90 rounds of .44 caliber ammunition; a .44 caliber Henry rifle loaded with 11 rounds, including one round in the chamber; and an additional 55 rounds of .44 caliber ammunition. J.A. 25; C.A. App. 70 n.1. All of the guns and ammunition were stored in unlocked bags in either the passenger area or between that area and the rear of the Jeep. J.A. 25.

Petitioner was later questioned by the FBI at Capitol Police headquarters. Gov't C.A. Br. 7. He said that he was a "Constitutional Bounty Hunter" and a "Private Attorney General" who traveled the nation with guns and other weapons to enforce federal criminal law

against judges whom he believed had acted unlawfully. *Ibid.* He explained that he had come to the Capitol and the House and Senate Office Buildings to have a "Commission by Declaration" signed. *Ibid.* He also told the agents that he was planning to take his weapons with him to bring charges against a federal judge in Pennsylvania, although he disclaimed any intention to use the weapons against the judge. *Ibid.*

2. A grand jury indicted petitioner on one count of unlawfully carrying or having readily accessible firearms on the Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1), and one count of carrying a pistol in public, in violation of D.C. Code § 22-4504(a) (LexisNexis 2001). J.A. 20-21. The latter charge was ultimately dismissed after the United States District Court for the District of Columbia, in another case, held the D.C. Code provision unconstitutional. C.A. App. 122-123; C.A. Supp. App. 134; see *Palmer* v. *District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

Petitioner eventually waived his right to counsel and was appointed standby counsel. J.A. 2-3. Petitioner filed a number of pro se motions seeking, *inter alia*, dismissal of his case. Pet. App. 11a-16a. He included assertions about the Second Amendment. C.A. App. 32-33; see *id.* at 36, 42-43, 46. Petitioner also faulted the government for not posting signs that would have informed him of the unlawfulness of his conduct, but he did not directly argue that Section 5104(e)(1) was unconstitutionally vague, nor did the government perceive him to be raising such an argument. See *id.* at 39, 65, 128; see *id.* at 124, 130, 138; see also Gov't C.A. Br. 29-31. The district court denied most of petitioner's motions, likewise without perceiving him to have raised a due process vagueness claim. C.A. App. 70-100. The

court did, however, order a substantive response from the government "to the extent [petitioner] challenges his prosecution under the Second Amendment" and on certain other issues. Pet. App. 16a; see C.A. App. 70-100.

At a subsequent motions hearing, the district court "generously" construed petitioner's minimal "assertions" that the D.C. city ordinance included in his original indictment "'is unconstitutional'" as a Second Amendment challenge to the federal charge of carrying a firearm on Capitol Grounds, in violation of 40 U.S.C. 5104(e)(1). Pet. App. 9a; see *id.* at 7a. The court rejected that challenge. *Id.* at 8a. The court observed that this Court's decision in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), which had held a different D.C. ordinance unconstitutional, had been "careful in emphasizing that nothing in [that] opinion should be taken to cast doubt on longstanding laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" and had "stressed that such laws are presumptively lawful, regulatory measures." Pet. App. 8a.

3. Petitioner's case was originally scheduled for a trial, but petitioner (who had been released on bond) failed to appear for it, notifying the district court by letter that he would no longer participate in the proceedings. Gov't C.A. Br. 4. Petitioner was arrested on a bench warrant and reindicted on one count of violating Section 5104(e)(1). *Ibid.* He subsequently entered an unconditional guilty plea, pursuant to a plea agreement, to that count. Pet. App. 2a; J.A. 29-47.

a. The plea agreement provided that in consideration for petitioner's guilty plea, the government agreed, *inter alia*, not to prosecute petitioner for his "failure

to appear for trial * * * in violation of 18 U.S.C. § 3146(a)(1)." J.A. 31. The government also agreed to seek a sentence at the low end of the estimated Sentencing Guidelines range, which was zero to six months of imprisonment and a $500 to $5000 fine. J.A. 33-35.

The plea agreement included a "Waivers" section that informed petitioner that his guilty plea constituted an "agree[ment] to waive certain rights afforded by the Constitution of the United States and/or by statute or rule." J.A. 38-39. The section describing the various "Trial Rights" that petitioner waived included "the right to appeal [a] conviction" had he been "found guilty after a trial." J.A. 39-40. The section describing petitioner's waiver of "Appeal Rights" included a specific "waive[r]" of "the right to appeal the sentence in this case * * * except to the extent" that the district court imposed a sentence "above the statutory maximum or guidelines range" that the court determined to be applicable. J.A. 40-41.

b. The district court held a plea hearing, at which it "conducted a full inquiry pursuant to Federal Rule of Criminal Procedure 11." Pet. App. 2a; see J.A. 48-94. Petitioner pleaded guilty unconditionally, without invoking the procedures of Rule 11(a)(2), whereby "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2).

The district court explained to petitioner that by entering his plea, he "would be generally giving up [his] rights to appeal." J.A. 63. Petitioner indicated that he understood. *Ibid.* The court then described "excep-

tions" to that general rule: for an appeal of his conviction "if [he] believe[d] that [his] guilty plea was somehow unlawful or involuntary or if there [were] some other fundamental defect in the[] guilty-plea proceedings," and for an appeal of his sentence "if [he] th[ought] the sentence [was] illegal." *Ibid.* Asked if he understood, petitioner responded, "Yeah. Pretty much." *Ibid.*

The district court then added, "[n]ow, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the rights I just explained to you, aside from the exceptions that I mentioned, because there will not be any trial, and there will probably be no appeal." J.A. 64. The court informed petitioner that he "may also have a right to appeal [his] sentence if it exceeds the Sentencing Guideline Range" and that he "could also challenge [his] conviction or sentence based on newly discovered evidence or a claim of ineffective assistance of counsel." *Ibid.* Petitioner indicated that he understood. *Ibid.*

After confirming that petitioner was willing to "give up" his trial rights, the district court had the following exchange with petitioner:

> THE COURT: Do you want to give up most of your rights to an appeal as well?
>
> [PETITIONER]: Other than what you mentioned, yes.
>
> THE COURT: Aside from those exceptions.

J.A. 66.

Later in the colloquy, the district court discussed with petitioner the appeal-waiver provisions of his plea agreement. J.A. 76. The court told petitioner that "under this plea agreement, you are giving up your right to

appeal your conviction and challenge the sentence I impose, unless the sentence exceeds the statutory maximum of the Guidelines Range or you claim newly discovered evidence or ineffective assistance of counsel." *Ibid.* Asked if he understood, petitioner responded, "Yes." J.A. 76-77.

The district court accepted the plea, finding that petitioner "was competent and capable of making a decision, that he understood the nature and consequences of what he was doing, that he entered his plea knowingly and voluntarily and of his own free will, and that there was a factual basis for his entering a plea of guilty." J.A. 96. The court sentenced petitioner to time served (24 days of imprisonment), to be followed by 12 months of supervised release, and a $250 fine. J.A. 11.

4. Petitioner appealed his conviction and filed a pro se opening brief, asserting factual, procedural, and substantive errors in the district-court proceedings. Pet. C.A. Br. 12-32. He relied on, *inter alia*, the Second Amendment. See *id.* at 12-13, 23-26.

a. The court of appeals appointed an amicus, whose arguments petitioner adopted. See Pet. 9 & n.4. The amicus brief argued that the federal statute under which petitioner had been convicted, 40 U.S.C. 5104(e), "violates the Second Amendment, as applied to a law-abiding adult citizen's right to keep legally-owned firearms in his vehicle parked in an unsecured, publicly-accessible parking lot" on the Capitol Grounds. C.A. Amicus Br. 1. It also argued that the statute was "unconstitutionally vague" because it is "exceedingly difficult for someone to determine that the Maryland Avenue parking lot is part of the Capitol Grounds" and the statute does not require proof of scienter. *Id.* at 4, 51.

The government's brief contended, *inter alia*, that petitioner's unconditional guilty plea, which had not invoked the conditional-plea procedures prescribed by Federal Rule of Criminal Procedure 11(a)(2), precluded him from raising those arguments on appeal. Gov't C.A. Br. 21-29. The government also observed that "[n]either Appellant nor Amicus argues that, under the Second Amendment, the firearms provision of the Capitol Grounds security statute is facially unconstitutional," *id.* at 26 n.14, and contended that the vagueness argument had been forfeited by petitioner's failure to raise it in district court, *id.* at 29-31.

b. The court of appeals affirmed. Pet. App. 1a-5a. The court perceived petitioner to be "assert[ing] three grounds of constitutional error and a further claim of statutory error," but held that "[n]one of them" was "properly before" the court on appeal. *Id.* at 3a.

The court of appeals observed that "[a]lthough the Federal Rules of Criminal Procedure provide for conditional pleas wherein a pleading defendant may 'reserve in writing the right to have an appellate court review an adverse determination of a specified pretrial motion,'" Pet. App. 3a-4a (brackets omitted) (quoting Fed. R. Crim. P. 11(a)(2)), petitioner's "plea in the present case contains no such reservation," *id.* at 4a. The court cited "well-established law that 'unconditional guilty pleas that are knowing and intelligent waive the pleading defendant's claims of error on appeal, even constitutional claims.'" *Id.* at 3a (brackets and ellipsis omitted) (quoting *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004), cert. denied, 544 U.S. 950 (2005)). And it determined that neither of the "two recognized exceptions to this rule"—namely, "'the defendant's claimed right not to be haled into court at all,' and a

claim 'that the court below lacked subject-matter jurisdiction over the case'"—"applies here." *Id.* at 4a (quoting *Delgado-Garcia*, 374 F.3d at 1341).

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner was not entitled to consent unconditionally to his conviction in district court, then attack the statute underlying his conviction on appeal. Petitioner had ample ways to preserve and present his constitutional claims. But he availed himself of none of them. Instead, petitioner relinquished his current claims by his failure to follow the conditional-plea procedure in Federal Rule of Criminal Procedure 11(a)(2). Raising those claims on appeal is also inconsistent with his admission of legal guilt and unconditional consent to entry of a judgment of conviction. And he additionally waived the right to appeal on those claims during his plea colloquy. Contrary to petitioner's contention, neither *Blackledge* v. *Perry*, 417 U.S. 21 (1974), which involved a prosecutorial-vindictiveness claim, nor *Menna* v. *New York*, 423 U.S. 61, 62 (1975) (per curiam), which involved a double-jeopardy claim, allows a defendant automatically to challenge his statute of conviction on appeal, irrespective of any forfeiture, admission, or waiver. The judgment should be affirmed.

A. As petitioner appears to acknowledge (Br. 30 n.4), a constitutional challenge to the statute underlying a criminal charge is not jurisdictional, does not implicate the power of the court to hear the case, and can be forfeited, waived, or otherwise precluded. See *United States* v. *Williams*, 341 U.S. 58, 66-69 (1951); Pet. Br. 30 n.4. Courts regularly decline to entertain such challenges, or review them only for plain error, when they have not been preserved. Petitioner's argument that

such claims deserve special exemption from normal waiver principles relies on retroactivity doctrines that are inapplicable here. If petitioner were attacking his conviction based on a recent binding judicial decision definitively establishing a new retroactive constitutional rule, he might well be entitled to relief. Although a defendant can forfeit, waive, or relinquish his right personally to pursue a legally uncertain claim—and does so by pleading guilty—a guilty plea does not implicitly or explicitly acquiesce in a punishment that has clearly been shown to lack any tenable legal basis. But a defendant seeking to substantively invalidate his conviction in the first instance on appeal, without having reserved the right to do so, cannot evade standard forfeiture, waiver, and relinquishment doctrines that preclude such appeals.

B. The exclusive procedure for preserving a constitutional challenge to a federal criminal statute to which a defendant pleads guilty is the conditional-plea procedure set forth in Federal Rule of Criminal Procedure 11(a)(2). Under that Rule, "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2). The Rule enhances the finality of guilty pleas by "clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects," Fed. R. Crim. P. 11 advisory committee's note (1983), like the defects petitioner asserts here. Neither the text of the Rule nor the Advisory Committee Notes contains any exception for appellate claims challenging the constitutionality of the statute of conviction. The Advisory Notes instead make clear that

the Rule is designed to preclude, as broadly as possible, a defendant from silently reserving issues for appeal without first notifying the court and the government of the respects in which he views his guilty plea to be inconclusive. The courts and the government agree in many cases to conditional pleas that preserve constitutional claims, including claims that the charging statute is unconstitutional. Petitioner was not entitled to bypass that procedure while obtaining its benefits.

C. Even aside from Rule 11(a)(2), a defendant's unconditional consent to entry of a judgment of conviction is inherently incompatible with the implicit reservation of a claim that relies on unestablished law to contest his guilt. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States* v. *Broce*, 488 U.S. 563, 569 (1989). In the absence of a new substantive constitutional rule, a defendant may not renounce the fundamental premise of his plea—his consent to the entry of legal judgment against him—by attacking the statute on which the judgment is premised. A defendant who voluntarily pleads guilty has made a strategic choice in which he accepts an adverse legal judgment in return for sentencing considerations and other potential benefits. So long as his plea knowingly and intelligently acquiesces to his conviction—which does not require his subjective awareness of potential defenses that the plea forecloses—it precludes an appellate attack on the presumptively lawful basis for that conviction.

Because a challenge to the statute of conviction is an attack on the conviction, rather than on the initiation of the proceedings through which the plea was obtained, it

is different in kind from the types of claims that this Court identified in *Blackledge* and *Menna* as exceptions to the general preclusive effect of a guilty plea. The prosecutorial-vindictiveness and double-jeopardy claims in those cases contended that the prosecution was "precluded * * * from haling a defendant into court on a charge." *Menna*, 423 U.S. at 62; see *Blackledge*, 417 U.S. 21. They thus challenged the act of commencing the prosecution and thereby forcing the defendant to enter a plea—an act to which the ensuing plea cannot be deemed to consent. Here, in contrast, the act of bringing a prosecution under a presumptively valid statute is not itself subject to attack. An appellate challenge to the statute's constitutionality contests not the filing of the charge but the conviction—the very thing to which the defendant acquiesced by pleading guilty.

D. The particular guilty plea in this case precludes petitioner's appeal for the additional reason that it was entered following multiple judicial warnings about its preclusive effect. The district court explained, and petitioner said he understood, that an appeal following the plea would generally be barred. None of the exceptions the court listed can fairly be construed to cover the claims that petitioner now raises. Petitioner's suggestion that his plea was not knowing and intelligent because he was unaware of its preclusive effect is outside the question presented, factually incorrect, and legally meritless. Even assuming petitioner did not fully comprehend the district court's explanation of the plea's preclusive scope, such perfect understanding is not required for the plea to be valid.

ARGUMENT

PETITIONER'S APPELLATE CHALLENGE TO HIS STATUTE OF CONVICTION IS FORECLOSED BY HIS UNCONDITIONAL GUILTY PLEA

A federal defendant who wishes to raise a constitutional challenge to the substantive criminal statute underlying his prosecution has multiple potential avenues for doing so. As an initial matter, he can bring the challenge in a pretrial motion to dismiss the indictment. Fed. R. Crim. P. 12(b)(1). If that motion is unsuccessful, he can preserve his claim for appeal by going to trial (where he can raise the claim again by moving for acquittal, see Fed. R. Crim. P. 29(a) and (c)); by offering to stipulate the facts necessary to prove guilt while maintaining his constitutional claim to legal innocence, see *Lefkowitz* v. *Newsome*, 420 U.S. 283, 290 n.7 (1975); or by seeking to enter a conditional plea in which his acceptance of legal guilt is qualified by his continued reservation of his constitutional claim, see Fed. R. Crim. P. 11(a)(2). A defendant can also later seek the benefit of a judicial decision that retroactively validates his claim and vitiates the government's authority to continue to punish him. See 28 U.S.C. 2255; see also, *e.g.*, *Welch* v. *United States*, 136 S. Ct. 1257, 1264-1265 (2016); *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 732 (2016).

What a defendant cannot do is unqualifiedly consent to conviction by entering an unconditional plea of guilty, then turn around and attack that conviction on appeal by challenging the presumptive validity of the statute underlying it. The many systemic benefits of guilty pleas—prompt resolution of criminal charges, conservation of judicial and prosecutorial resources, and the potential for more favorable sentencing terms—"can be

secured * * * only if dispositions by guilty plea are accorded a great measure of finality." *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). Permitting petitioner here to challenge his conviction on appeal on grounds that he did not reserve in a conditional plea under Federal Rule of Criminal Procedure 11(a)(2), that are inconsistent with his admission of legal guilt, and that he expressly waived his right to raise during the plea colloquy would undermine both the finality of guilty pleas and the orderly procedures developed to ensure it.

Petitioner errs in relying on the Court's treatment of the prosecutorial-vindictiveness and double-jeopardy claims in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61, 62 (1975) (per curiam), to argue that an appellate challenge to a statute of conviction automatically survives all plea-related relinquishment and need not be preserved. Neither *Blackledge* nor *Menna* identifies such a challenge as jurisdictional, or otherwise immune to relinquishment. The drafters of Rule 11(a)(2) accordingly did not view such challenges to be outside the scope of the Rule's mandatory preservation procedures, even though they thought that the specific claims in *Blackledge* and *Menna* were. Furthermore, the exception that *Blackledge* and *Menna* recognize to the inherent preclusive effect of a guilty plea does not encompass challenges to the statute of conviction, which attack the very legal guilt that the defendant has admitted, rather than the act of filing the charges that required the defendant to appear in court and enter a plea. And nothing in *Blackledge* and *Menna* forecloses the possibility of an express waiver of appellate claims.

A. A Challenge To The Constitutionality Of A Substantive Criminal Statute Is A Nonjurisdictional Claim That Can Be Forfeited Or Waived

As petitioner appears to acknowledge (Br. 30 n.4), a claim that a criminal statute is unconstitutional, either on its face or as applied, does not present an issue of "jurisdiction" that involves "the courts' statutory or constitutional power to adjudicate the case," *United States* v. *Cotton*, 535 U.S. 625, 630 (2002) (emphasis omitted) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). It is thus a type of claim that can "be forfeited or waived." *Ibid.*

1. This Court's decision in *United States* v. *Williams*, 341 U.S. 58 (1951), makes clear that the constitutionality of the statute under which a defendant is charged and convicted is not a question of subject-matter jurisdiction. *Id.* at 66-69. The Court held in *Williams* that a district court is "authorized to render judgment on the indictment" even when the charges in the indictment are legally defective. *Id.* at 66. The Court explained that "[e]ven the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction." *Ibid.* "Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional," it nevertheless "has proceeded with jurisdiction." *Id.* at 68-69.

The Court's explication of that principle in *Williams* postdates, and for relevant purposes supersedes, the discussion in *Ex parte Siebold*, 100 U.S. 371 (1880), cited by petitioner (Br. 26, 29-30). *Siebold* addressed the scope of a court's "criminal jurisdiction" only for purposes of delimiting Court's own habeas jurisdiction under the law as it existed at that time. See 100 U.S. at

376 (citation omitted). In the era when *Siebold* was decided, such habeas review was limited to claims that "the convicting court had no jurisdiction to render the judgment which it gave," *Cotton*, 535 U.S. at 630 (citation and internal quotation marks omitted), and direct review of a criminal conviction in this Court did not exist, *ibid.* As the Court has since recognized, the Court accordingly relied on a "somewhat expansive notion of 'jurisdiction,'" *Custis* v. *United States*, 511 U.S. 485, 494 (1994), to address constitutional claims on habeas. By the middle of the twentieth century, however, this Court "finally abandoned the kissing of the jurisdictional book," *id.* at 509 (Souter, J., dissenting) (citation omitted), and openly entertained constitutional claims on habeas without maintaining a jurisdictional "fiction," *Wainwright* v. *Sykes*, 433 U.S. 72, 79 (1977).

2. Because a constitutional challenge to a statute of conviction is not "jurisdiction[al] in the modern sense," Pet. Br. 30 n.4, it is subject to forfeiture, waiver, and preclusion. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Similarly, even the "most basic rights of criminal defendants are * * * subject to waiver." *Peretz* v. *United States*, 501 U.S. 923, 936 (1991); see *id.* at 936-937 (listing examples).

Like most other constitutional claims, a challenge to a statute's constitutionality can be relinquished. "[N]one would suggest that a litigant may never waive the defense that a statute is unconstitutional." *Plaut* v. *Spendthrift*

Farm, Inc., 514 U.S. 211, 231 (1995). And "virtually all circuits" have faced forfeited "constitutional challenges to criminal statutes and have either refused to address them because the defendants had neglected to raise them below, or decided to reach them only upon determining that the lower court's failure to address them constituted 'plain error.'" *United States* v. *Baucum*, 80 F.3d 539, 541 (D.C. Cir.) (per curiam), cert. denied, 519 U.S. 897 (1996); see *id.* at 541 n.2 (citing cases). Those results would not be possible if the constitutionality of the statute of conviction were a jurisdictional issue.

3. Petitioner's suggestion (Br. 26-27, 29-34) that challenges to a statute of conviction warrant special treatment with respect to preservation is misplaced. Although an unconstitutional law can in some sense be described as "void" (*e.g.*, Pet. Br. 26 (citation omitted)), this Court has made clear that a constitutional challenge to a law—especially an as-applied challenge—does not suggest that the law is a complete nullity for all purposes. See *Williams*, 341 U.S. at 66, 68-69. Claims that a particular conviction implicates conduct beyond Congress's power to criminalize are just as subject to preservation rules as other claims. The Court has recognized, for example, that a claim that a defendant may have been "convicted based exclusively on noncriminal conduct," is subject to forfeiture when it is not raised in district court. See *United States* v. *Marcus*, 560 U.S. 258, 265 (2010); see *id.* at 260, 262, 264-265.

Petitioner's reliance (Br. 29-34) on this Court's retroactivity jurisprudence is inapt. The retroactivity inquiry concerns the scope of a judicial decision that has *already* definitively established a defendant-favorable constitutional rule, asking whether that rule should ex-

tend to cases in which direct review has already concluded. See, *e.g.*, *Welch*, 136 S. Ct. at 1264-1265. In the context of that inquiry, the Court has held that when a decision creates a new rule invalidating the substantive basis for a defendant's punishment—*e.g.*, by holding the statute of conviction unconstitutional—the defendant may potentially rely on that decision to seek collateral relief. See, *e.g.*, *Montgomery*, 136 S. Ct. at 729-732. Nothing in the Court's retroactivity doctrine, however, entitles a defendant who is challenging his statute of conviction on grounds that are not yet settled to disregard standard rules of waiver, forfeiture, and preclusion. Although such a challenge, if ultimately vindicated, could potentially produce a retroactive legal rule, that does not excuse the defendant from adherence to normal litigation standards along the way. To the contrary, treating a defendant's efforts to challenge a statute as if he had already prevailed would upend the "strong presumption of constitutionality due to an Act of Congress," *United States* v. *Watson*, 423 U.S. 411, 416 (1976) (quoting *United States* v. *Di Re*, 332 U.S. 581, 585 (1948)).

4. The distinction between challenges seeking to make new law and retroactive application of established law also illustrates the error in petitioner's contention (Br. 34-35) that defendants like him will have no recourse unless his position in this case prevails. If a later judicial decision were definitively to establish the substantive unconstitutionality of such a defendant's conviction, the imposition of punishment on the defendant would no longer be presumptively (or actually) lawful. See *Montgomery*, 136 S. Ct. at 729-730. The defendant could thus seek appropriate relief, such as by filing a motion under 28 U.S.C. 2255 collaterally attacking his

conviction and sentence. See *Davis* v. *United States*, 417 U.S. 333, 346-347 (1974) (recognizing that Section 2255 authorizes claim that defendant was convicted "for an act that the law does not make criminal"); see also 28 U.S.C. 2255(f)(3) (fresh statute of limitations for claims based on retroactive decisions of this Court).

The reason a defendant could seek such relief is because a district court's entry of judgment, whether it follows a guilty plea or otherwise, necessarily presupposes the existence of at least some tenable legal basis for the defendant's conviction and sentence. So long as such a tenable basis exists, a defendant can validly forfeit, waive, or otherwise relinquish his personal right to advance a legally uncertain challenge to it—as he does by electing to enter a plea in which he ceases to contest his legal guilt. See, *e.g.*, *United States* v. *Broce*, 488 U.S. 563, 569-574 (1989); see Part C, *infra*. But such relinquishment does not extend to a future clarification of the law that unequivocally removes the substantive basis for criminal liability. In that situation, the admissions in the plea cannot transform unlawful imprisonment into a lawful sentence.

Although a defendant's failure to challenge a statute on direct review following a guilty plea would constitute procedural default for purposes of collateral review, see *Bousley* v. *United States*, 523 U.S. 614, 621 (1998), that bar does not apply when a defendant is "actually innocent" of any substantive crime for which he could validly be punished, *id.* at 623-624, which will be the case when the only conduct for which he could have been convicted is constitutionally protected. Furthermore, the government has the ability to waive the procedural bar in cases where defendants have meritorious substantive claims, as it has done with defendants whose sentences rest on

the statutory enhancement that this Court held to be unconstitutionally vague in *Johnson* v. *United States*, 135 S. Ct. 2551, 2555, 2563 (2015).

5. Petitioner does not seek collateral relief in reliance on a settled principle of constitutional law. He instead seeks to challenge on appeal the constitutionality of prohibiting firearms on the Capitol Grounds based on arguments that are unsupported by this Court's decisions and that have been rejected by other courts of appeals. See *McDonald* v. *City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion) (explaining that Court's jurisprudence does "not cast doubt on such longstanding regulatory measures as * * * 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings'") (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008)); see, *e.g.*, *Bonidy* v. *United States Postal Serv.*, 790 F.3d 1121, 1125-1127 (10th Cir. 2015) (rejecting Second Amendment challenge to prohibition on firearms in parking lot adjacent to post office), cert. denied, 136 S. Ct. 1486 (2016); *United States* v. *Masciandaro*, 638 F.3d 458, 460, 473-474 (4th Cir.) (rejecting Second Amendment challenge to conviction for possessing a firearm in a national-park parking lot), cert. denied, 565 U.S. 1058 (2011). He also seeks to raise a vagueness argument that he did not present to the district court. See Gov't C.A. Br. 29-31.

Petitioner has no affirmative constitutional right to raise those arguments on appeal. See *Davila* v. *Davis*, No. 16-6219 (June 26, 2017), slip op. 8 ("The Constitution * * * does not guarantee the right to an appeal at all."). To the contrary, the "right of appeal, as we presently know it in criminal cases, is purely a creature of statute." *Abney* v. *United States*, 431 U.S. 651, 656

(1977). Accordingly, complete or partial limitations on the opportunity to raise an argument in an appellate forum have a long historical pedigree. See, *e.g.*, *Martinez* v. *Court of Appeal*, 528 U.S. 152, 159 & n.7 (2000); *Abney*, 431 U.S. at 656 n.3; *Carroll* v. *United States*, 354 U.S. 394, 400 n.9 (1957). In particular, it has long been the case that a potential appellate claim can be forfeited, waived, or precluded. See, *e.g.*, *Friedenstein* v. *United States*, 125 U.S. 224, 230 (1888) (concluding that argument that defendant had failed properly to raise in district court "must be regarded as having been waived, or as having been cured by the verdict").

B. Federal Rule Of Criminal Procedure 11(a)(2) Requires A Defendant To Enter A Conditional Plea In Order To Challenge The Constitutionality Of The Statute Of Conviction On Appeal

Petitioner relinquished his right to challenge 40 U.S.C. 5104(e) on appeal by failing to preserve his claims through a conditional plea under Federal Rule of Criminal Procedure 11(a)(2). A defendant's statutory right to appeal is subject to this Court's delegated "power to prescribe general rules of practice and procedure * * * for cases in the United States district courts * * * and courts of appeals." 28 U.S.C. 2072(a). Although such rules may "not abridge, enlarge or modify any substantive right," 28 U.S.C. 2072(b), they are "as binding as any statute duly enacted by Congress" on matters of procedure, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). They can thus be applied to foreclose or limit an appeal. See, *e.g.*, *Manrique* v. *United States*, 137 S. Ct. 1266, 1271-1274 (2017) (enforcing rule-based timing requirement for criminal appeals). Here, Rule 11(a)(2) requires that a defendant explicitly preserve any constitutional challenge to his

statute of conviction in order to raise that challenge on appeal following a guilty plea.

1. Rule 11(a)(2) precludes appeal of pretrial issues that were not expressly reserved in the defendant's guilty plea

Rule 11(a)(2) provides that "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2); see *ibid.* ("A defendant who prevails on appeal may then withdraw the plea."). When a defendant follows that procedure, he ensures that the parties and the court have a mutual understanding of the respects in which he does not intend his plea to be final. When, however, he forgoes that procedure, he relinquishes appeal rights he might otherwise have preserved.

a. Rule 11(a)(2) allows a defendant to designate his plea as "conditional" on the appellate resolution of an issue that was the subject of an "adverse determination of a specified pretrial motion." Fed. R. Crim. P. 11(a)(2). In order to do so, the defendant must "reserv[e] in writing the right to have an appellate court review" that issue. *Ibid.* The natural implication of those textual preconditions is that a defendant who pleads guilty *cannot* challenge his conviction on appeal on a forfeitable or waivable ground that he either failed to present to the district court or failed to reserve in writing. See, *e.g.*, *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (concluding that the "natural meaning" of a statute allowing someone to "'seek contribution . . . during or following'" a particular type of "'civil action'" was "that contribution may only be

sought subject to the specified conditions") (emphasis and citation omitted); *Continental Cas. Co.* v. *United States*, 314 U.S. 527, 533 (1942) ("The statement of the conditions negatives action without the satisfaction of those requirements.").

That textual implication is reinforced by other features of the Rules. For example, Rule 32 requires a district court to advise a defendant of his "right to appeal the conviction" only when he has "pleaded not guilty," Fed. R. Crim. P. 32(j)(1)(A); a defendant who has pleaded guilty is advised only of his "right to appeal the sentence," Fed. R. Crim. P. 32(j)(1)(B). Similarly, Rule 11 itself requires a district court conducting a plea colloquy to discuss with the defendant only a "plea-agreement provision waiving the right to appeal or to collaterally attack the sentence," Fed. R. Crim. P. 11(b)(1)(N), suggesting that a plea-agreement provision waiving rights to appeal the conviction would generally be redundant of preexisting limitations.

b. Where the Rules do anticipate appeals of plea-based convictions, they do so only with respect to procedural issues concerning the plea itself, not the substance of the conviction. And even then they circumscribe the scope of appellate review to advance the strong systemic interest in finality.

Rule 11(h) explicitly provides that a "variance from the requirements" of Rule 11 itself, which governs plea procedures, are subject to harmless-error review on appeal. Fed. R. Crim. P. 11(h); see, *e.g.*, *United States* v. *Vonn*, 535 U.S. 55, 58 (2002). The Advisory Committee, while acknowledging that the "interest in finality" of guilty pleas "is of somewhat lesser weight when a direct appeal is involved" than "in the collateral attack con-

text," nevertheless found the finality interest "sufficiently compelling" in the appellate setting to warrant limitations on review. Fed. R. Crim. P. 11 advisory committee's note (1983).

In addition, this Court has itself interpreted the Federal Rules, with "finality" concerns in mind, to foreclose appellate relief for claims of Rule 11 error that were not raised in district court, unless the stringent plain-error requirements of Rule 52(b) are satisfied. *Vonn*, 535 U.S. at 72-74. The Court has further explained that the application of that plain-error standard "should respect the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 82-83 (2004).

2. Rule 11(a)(2)'s preservation requirement applies to a claim that the statute of conviction is unconstitutional

Rule 11(a)(2)'s prerequisites apply, without qualification, to any forfeitable issue that may be raised in a "pretrial motion." Fed. R. Crim. P. 11(a)(2). Nothing in the text of the Rule creates or suggests an exception to its procedural requirements for challenges to a defendant's statute of conviction. And the Advisory Committee Notes confirm that no such exception was intended.

a. The Notes explain that "the availability of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects." Fed. R. Crim. P. 11 advisory committee's note (1983). That explanation reinforces the Rule's unqualified text by

making clear that the Committee intended an unconditional guilty plea to renounce all waivable claims—a set that includes a claim challenging the constitutionality of the statute of conviction.

The standard definition of "jurisdictional" in the judicial context, both when Rule 11(a)(2) was enacted and now, refers to "the authority by which courts and judicial officers take cognizance of and decide cases." *Black's Law Dictionary* 766 (5th ed. 1979) (defining "jurisdiction"); see *ibid.* (similar alternative definitions of "jurisdiction"); *ibid.* (defining "jurisdictional," as relevant here, to mean "[p]ertaining or relating to jurisdiction"); *id.* at 336 (defining "criminal jurisdiction" as "[p]ower of tribunal to hear and dispose of criminal cases"); see also *Black's Law Dictionary* 980 (10th ed. 2014). A defect that is "jurisdictional"—*i.e.*, one that goes to the court's "power to adjudicate"—is one that "can never be forfeited or waived." *Cotton*, 535 U.S. at 630 (emphasis omitted).

The Committee's statement thus illustrates that Rule 11(a)(2) was designed to bring as much finality and certainty as possible to guilty pleas by ensuring that an unconditional plea would foreclose any subsequent appellate claim that is subject to forfeiture. The Committee viewed such a "traditional plea of guilty" as having "complete finality," because it admits both "legal guilt" and "factual guilt." Fed. R. Crim. P. 11 advisory committee's note (1983) (citation omitted). And it viewed a conditional plea as having nearly as much finality, because it admits "factual guilt" and the defendant's admission of "legal guilt" will be disturbed only "if the reserved issue is ultimately decided in the government's favor" on appeal. *Ibid.* (citation omitted). The Committee did not, however, intend to leave open the additional

possibility of reversal on appeal of a nonjurisdictional claim that the defendant failed to reserve, such as a challenge to the constitutionality of the statute of conviction.

b. Had the Committee intended such a challenge to be exempt from the Rule's requirements, and thus to intrude on the finality of a plea, it would have said so. But the unqualified text of the Rule, and the Notes' use of the term "nonjurisdictional," convey the opposite, particularly given the drafters' intent that defendants "identify precisely what pretrial issues have been preserved for appellate review." Fed. R. Crim. P. 11 advisory committee's note (1983).

Indeed, although some sources cited in the Notes erroneously described challenges to a statute of conviction as "jurisdictional," the Committee itself did not repeat, let alone endorse, such inaccuracy. Compare, *e.g.*, *United States* v. *Cox*, 464 F.2d 937, 940-941 (6th Cir. 1972), and John D. Botsford, Comment, *Conditioned Guilty Pleas*, 26 UCLA L. Rev. 360, 360 n.1 (1978), with Fed. R. Crim. P. 11 advisory committee's note (1983). The Committee could not have intended silently to depart from *Williams*'s understanding about the nonjurisdictional nature of such challenges, particularly when circuit practices about allowing such challenges after a plea were not entirely uniform, see *Shaffer* v. *United States*, 435 F.2d 168, 168 (9th Cir. 1970) (per curiam) (holding that plea precluded collateral as-applied constitutional challenge to statute of conviction).

c. Petitioner errs in reading (Br. 37-38) the Notes' brief discussion of *Menna* v. *New York*, *supra*, and *Blackledge* v. *Perry*, *supra*, to implicitly exempt constitutional challenges to a statute of conviction from Rule 11(a)(2). The Committee observed, citing *Menna* and

Blackledge, that this Court had "held that certain kinds of constitutional objections may be raised after a plea of guilty." Fed. R. Crim. P. 11 advisory committee's note (1983). It parenthetically described *Menna* as involving a "double jeopardy violation" and *Blackledge* as involving a "due process violation by charge enhancement following [a] defendant's exercise of [a] right to trial de novo." *Ibid.* The Committee explained that Rule 11(a)(2) "has no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application." *Ibid.*

At the time the Notes were written, the Committee may well have believed that the particular "kinds of constitutional objections" at issue in *Blackledge* and *Menna* were unwaivable and thus beyond the permissible scope of the preservation procedures that the Rule's unqualified text requires. It was not until four years later that this Court's "decision in *Ricketts* v. *Adamson*, 483 U. S. 1 (1987), made clear that the protection against double jeopardy is subject to waiver." *Broce*, 488 U.S. at 568; see *ibid.* (noting a court of appeals' mistake on this point); see also *Menna*, 423 U.S. at 62 n.2 (disavowing holding on general waivability of double-jeopardy claims). The nonjurisdictional nature of a constitutional challenge to a statute of conviction, in contrast, had been clarified in *Williams*, long before Rule 11(a)(2) was promulgated. That is presumably why the Committee, while highlighting two "kinds of constitutional objections" as exempt from the Rule, omitted any similar mention of constitutional challenges to statutes.

Particularly damaging to petitioner's view is the Committee's omission of any reference to *Haynes* v.

United States, 390 U.S. 85 (1968). In *Haynes*, the defendant had raised an as-applied constitutional challenge to a criminal statute in district court before pleading guilty, and this Court—without objection from the government or analysis beyond citation of a single circuit decision—permitted the renewal of that challenge on appeal. *Id.* at 86-87, 90 & n.2 (citing *United States* v. *Ury*, 106 F.2d 28 (2d Cir. 1939)). The Advisory Committee was doubtless aware of *Haynes*—which was cited in decisions mentioned in the Notes, see, *e.g.*, *Cox*, 464 F.2d at 940-941—but did not associate it with *Blackledge* and *Menna* or separately identify it as exemplifying a procedure that it viewed to be permissible. To the contrary, the Committee made clear that a procedure of the sort employed in *Haynes*, in which the filing of a pretrial motion was alone deemed sufficient to preserve an issue for a post-plea appeal, would not be allowed under Rule 11(a)(2). See Fed. R. Crim. P. 11 advisory committee's note (1983) (explaining that Rule 11(a)(2) would "avoid * * * post-plea claims by the defendant that his plea should be deemed conditional merely because it occurred after denial of his pretrial motions"); see also *Bank of Nova Scotia*, 487 U.S. at 254 (recognizing that Federal Rules displace courts' supervisory authority).

3. Requiring express preservation of constitutional challenges to statutes through a conditional plea furthers the interests underlying Rule 11(a)(2)

Allowing a challenge to the statute of conviction on appeal in the absence of a conditional plea under Rule 11(a)(2) would subvert the Rule's goals. Cf. *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702, 1707 (2017) (rejecting procedural "tactic" for appealing an issue that would, *inter alia*, "subvert the balanced solution * * * put in place" by a Federal Rule of Civil Procedure).

a. The Committee intended Rule 11(a)(2) "to conserve prosecutorial and judicial resources and advance speedy trial objectives," by "avoid[ing] the necessity for trials which are undertaken for the sole purpose of preserving pretrial objections." Fed. R. Crim. P. 11 advisory committee's note (1983). In designing the Rule's procedures, the Committee respected the "interest in achieving finality," by limiting an appeal following a plea to the "reserved issue." *Ibid.* (citation omitted). It also respected the interest in clarity, by requiring documentation "that a particular plea was in fact conditional," with a record of the "precise[] * * * pretrial issues [that] have been preserved." *Ibid.*

Exempting claims that the statute of conviction is unconstitutional from the conditional-plea procedure would undermine the interests in efficiency, finality, and clarity that the Rule promotes. The goal of a conditional plea is that it be "entered with the clear understanding and expectation by the [government], the defendant, and the courts that it will not foreclose judicial review of the merits of the [reserved] alleged constitutional violations." *Lefkowitz*, 420 U.S. at 290. Such an understanding is particularly helpful when the plea is the product of negotiation, so that the government knows exactly what it gets for its concessions in the plea agreement. See *Broce*, 488 U.S. at 576 (noting potential for a "plea bargain which incorporates concessions by the Government" to "heighten[] the already substantial interest the Government has in the finality of the plea") (emphasis omitted).

The Rule's requirement that the court and the government agree with the defendant that a particular issue should be reserved for a post-plea appeal also plays an important role. See Fed. R. Crim. P. 11(a)(2). The

Committee recognized that allowing a defendant to reserve issues unilaterally could result in wasteful litigation. A defendant might, for example, attempt to appeal "on a matter which can only be fully developed by proceeding to trial." Fed. R. Crim. P. 11 advisory committee's note (1983). Or he might seek to raise an issue that would not "dispose of the case" and would "only serve to postpone the trial and require the government to try the case after substantial delay." *Ibid.* The court and the government provide an effective screen against such unproductive appeals. *Ibid.*

b. Petitioner contends (Br. 38) that "[i]t would make little sense" to require the government's concurrence in a conditional plea that seeks to preserve a challenge to the statute of conviction. But the Committee explained that although "the conditional plea device will be most commonly employed" in relation to a "motion to suppress evidence," the "objectives of the rule are well served by extending it to other pretrial rulings as well." Fed. R. Crim. P. 11 advisory committee's note (1983). That includes pretrial rulings rejecting a constitutional challenge to the underlying criminal statute.

Such a challenge will not automatically be fit for appellate review. It may, for example, not be "case-dispositive," Fed. R. Crim. P. 11 advisory committee's note (1983), as where it relates to only one of multiple means by which the government might prove that the defendant committed the charged offense. Or constitutional challenges, particularly as-applied challenges, may benefit from factual development that did not occur in the context of any pretrial proceedings. See *ibid.*; see also, *e.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 626-627 (1994) (remanding case challenging constitutionality of statute for further factual development).

Here, for example, petitioner's own arguments suggest that his Second Amendment or vagueness claims may be informed by, *inter alia*, the precise location in which he parked his Jeep, the presence of visible indications that the area was on the Capitol Grounds, and enforcement practices under the statute. See, *e.g.*, C.A. Amicus Br. 32, 53. But even if no further factual development were necessary, appeal would still be precluded in light of petitioner's failure to provide the court and the government with an upfront understanding of, and opportunity to address, the proper scope of appellate review.

c. As a general matter, the government may not typically offer, or always be open to, conditional pleas. See, *e.g.*, NACDL Amicus Br. 20-21 (citing small number of cases discussing issue in context of suppression claims). But petitioner errs in suggesting (Br. 38) that the Rule must be interpreted to exempt challenges to a statute of conviction from the requirement that the government concur in a conditional plea. Petitioner provides no empirical evidence that the government habitually withholds consent for conditional pleas in the rare cases in which a defendant raises a colorable legal challenge to the constitutionality of the charging statute. And he identifies no practical justification for singling out those cases as ones in which the consent requirement would be problematic.

An appendix to this brief lists more than 50 decisions from the federal courts of appeals that expressly note the use of a conditional plea to preserve an appellate challenge to the constitutionality of the statute of conviction. Several recent opinions in this Court have similarly explicitly mentioned the use of that procedure to preserve such claims. See, *e.g.*, *Bond* v. *United States*, 134 S. Ct. 2077, 2085-2086 (2014) (Tenth Amendment

challenge); *United States* v. *Alvarez*, 567 U.S. 709, 713-716 (2012) (plurality opinion) (First Amendment challenge); *Carr* v. *United States*, 560 U.S. 438, 441-442 (2010) (ex post facto challenge); see also, *e.g.*, *Small* v. *United States*, 544 U.S. 385, 387 (2005) (challenge to statute's scope). No reason exists to presume that conditional pleas based on constitutional challenges to statutes are being unreasonably blocked by the government's failure to consent.

C. An Unconditional Guilty Plea Inherently Relinquishes An Appellate Challenge To The Constitutionality Of The Statute Of Conviction

The procedural requirements of Rule 11(a)(2) are alone sufficient to resolve this case. Petitioner identifies no affirmative right that would entitle a defendant who has failed to preserve a constitutional challenge to his statute of conviction in accordance with Rule 11(a)(2) to nevertheless raise such a challenge on appeal. He contends (Br. 1) only that such a challenge is not "inherently waived or foreclosed" by the unconditional plea itself. Even that, however, is incorrect. The natural consequence of a defendant's unconditional acquiescence to a legal judgment of conviction is to foreclose constitutional claims incompatible with that judgment—including challenges to the statute underlying it, insofar as they seek to make new law.

1. A constitutional challenge to the statute of conviction is inconsistent with unconditional consent to a judgment of conviction that presumes legal guilt

a. The inherent finality of a guilty plea is achieved by defining the plea as an acknowledgment of both factual and legal guilt that is in itself sufficient to support the entry of judgment. "By entering a plea of guilty,

the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *Broce*, 488 U.S. at 570. The plea thus represents "the defendant's consent that judgment of conviction may be entered without a trial." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see, *e.g.*, *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004) (explaining that a guilty plea is "itself a conviction") (quoting *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969)). Once the court has accepted the plea, "nothing remains but to give judgment and determine punishment." *Boykin*, 395 U.S. at 242; see *Machibroda* v. *United States*, 368 U.S. 487, 492 (1962); *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927).

The inherent conclusiveness of a plea-based conviction limits the ways in which that conviction may be attacked. "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." *Broce*, 488 U.S. at 569. "If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack." *Ibid.* The Court has accordingly held that a guilty plea precludes, for example, post-plea claims alleging that the charging statute had an unconstitutional penalty provision, see, *e.g.*, *Brady*, 397 U.S. at 749-758; that a confession was coerced, see *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970); that a grand jury was improperly constituted, see *Tollett* v. *Henderson*, 411 U.S. 258, 266-267 (1973); and that a defendant was unconstitutionally convicted of two offenses instead of one, see *Broce*, 488 U.S. at 565. See *Tollett*, 411 U.S. at 266 (ex-

plaining that *Brady* and *McMann* "foreclose direct inquiry into the merits of claimed antecedent constitutional violations" as well as claims that they affected the plea's voluntariness).

That preclusion principle applies even without a "conscious waiver * * * with respect to each potential defense relinquished by [the] plea of guilty." *Broce*, 488 U.S. at 573. "Relinquishment," this Court has explained, "derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea." *Id.* at 573-574. And because the relinquishment is inherent in the plea itself, preclusion applies not only on collateral review, but also on direct appeal. See, *e.g.*, Pet. Br. 21-22 (making no distinction between collateral and direct review). This Court has recognized, for example, a default rule in state court that a defendant "must plead not guilty and go to trial to preserve the opportunity for state appellate review of his constitutional challenges to arrest, admissibility of various pieces of evidence, or the voluntariness of a confession." *Lefkowitz*, 420 U.S. at 289. "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Ibid.* The same default rule applies in the federal system. See *id.* at 288 (deriving the rule from, *inter alia*, *Brady* v. *United States*, *supra*); Pet. Br. 16-34 (relying interchangeably on state and federal cases).

b. Unless he is relying on a newly established rule of constitutional law that is necessarily beyond the scope

of the plea, see p. 20, *supra*, a defendant who unconditionally accepts the entry of judgment from the district court premised on his legal guilt cannot then seek to undo the judgment on appeal by contesting legal guilt. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *Broce*, 488 U.S. at 569. One of the "legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," *ibid.*, is the defendant's "admission of guilt of a substantive criminal offense as charged in [the] indictment," *Libretti* v. *United States*, 516 U.S. 29, 38 (1995). Although that admission would not preclude reliance on a future retroactive rule that eliminates any current legal basis for punishment, it necessarily concedes that the conviction is not barred by then-applicable law and consents to the entry of a valid judgment. A defendant's about-face on appeal to seek a new legal rule that invalidates judgment on the substantive offense charged in the indictment, therefore, repudiates the core premise of his plea.

For that reason, "[w]hen a defendant admits guilt of a substantive crime, he cannot reverse course on appeal and claim the criminal statute is unconstitutional." *United States* v. *De Vaughn*, 694 F.3d 1141, 1154 (10th Cir. 2012), cert. denied, 133 S. Ct. 2383 (2013). A guilty plea reflects a defendant's "strategic choice" to accept "conviction," *Nixon*, 543 U.S. at 187, on the expectation that it is in his best interest (*e.g.*, for sentencing purposes) to do so. See, *e.g.*, *North Carolina* v. *Alford*, 400 U.S. 25, 32, 36 (1970); *Brady*, 397 U.S. at 752. In entering such a plea, a defendant accepts that he may be treated as legally guilty, even if additional proceedings might have established that he is not. See, *e.g.*,

Broce, 488 U.S. at 571 (holding that defendants' guilty plea to two conspiracy charges was in lieu of an "attempt to show the existence of only one conspiracy in a trial-type proceeding"). Indeed, this Court has recognized that a defendant may validly acquiesce in treatment consistent with legal guilt even *without* explicitly acknowledging such guilt. *Alford*, 400 U.S. at 33-39. "[T]he Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence." *Id.* at 36.

c. A plea, and its corresponding concessions, are valid so long as "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Alford*, 400 U.S. at 31. Once "a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged," he may "attack the voluntary and intelligent character of the guilty plea" itself, *Tollett*, 411 U.S. at 267, but generally may not attack the law and facts undergirding the conviction, *ibid.*; see *Broce*, 488 U.S. at 569.

A challenge to the statute of conviction does not impugn the voluntary and intelligent nature of the plea, or otherwise suggest that the plea was defective. Although "a plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charge against him," the defendant's receipt of a copy of his indictment, "standing alone, give[s] rise to a presumption" that such notice was provided. *Bousley*, 523 U.S. at 618 (citation and internal quotation marks omitted). Additional circumstances may rebut

that presumption; a defendant can, for example, challenge the knowing and intelligent nature of his plea on appeal when the district court affirmatively "misinformed" him about "the essential elements of the crime with which he was charged." *Ibid.*; see *id.* at 621-622. But a knowing and intelligent plea does not require that the district court inform the defendant, or that the defendant comprehend, potential constitutional challenges to the underlying statute.

The Court "has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *United States* v. *Ruiz*, 536 U.S. 622, 630 (2002). In particular, a plea may be knowing, intelligent, and valid notwithstanding a defendant's misapprehension about the availability of a "potential defense," *ibid.* (citing *Broce*, 488 U.S. at 573), including a constitutional defense that would if successful preclude conviction on a particular charge, see *Broce*, 488 U.S. at 573-574 (double-jeopardy claim). The Court has also rejected challenges to the knowing and voluntary nature of a plea where the defendant was charged under a statute with a death-penalty provision later held unconstitutional, the effect of which was to make a guilty plea the only way to avoid the possibility of a death sentence. See *Brady*, 397 U.S. at 749-758; see also *Parker* v. *North Carolina*, 397 U.S. 790, 794-795 (1970) (same).

A defendant's lack of awareness of unproven constitutional objections when he pleaded guilty would at most give rise to a claim of ineffective assistance of

counsel. See *Broce*, 488 U.S. at 574; *Tollett*, 411 U.S. at 267; see also, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52, 59-60 (1985). It would not entitle the defendant to contravene the "admissions necessarily made upon entry of a voluntary plea of guilty," *Broce*, 488 U.S. at 573-574, by challenging the constitutionality of the statute supporting the judgment of legal guilt to which he voluntarily consented.

2. No exception to the preclusive effect of a guilty plea allows for an appellate challenge to the constitutionality of the statute of conviction

This Court's decisions in *Blackledge* and *Menna* recognized "[a]n exception" to the general preclusive effect of a guilty plea. *Broce*, 488 U.S. at 574. That exception does not encompass a defendant's claim that the statute underlying the conviction is unconstitutional. *Blackledge* addressed a claim of prosecutorial vindictiveness under the Due Process Clause; *Menna* addressed a claim under the Double Jeopardy Clause. In both cases, the Court viewed the relevant constitutional violation to be the filing of the charges that forced the defendant to enter a plea, not the substance of the conviction itself.

a. In *Blackledge*, the defendant pleaded guilty to a felony charge filed by the State in retaliation for the defendant's appeal of a conviction on a misdemeanor charge for the same conduct. 417 U.S. at 22-23. The "nature of the * * * constitutional infirmity" asserted on federal habeas review was that "the State * * * was, under the facts of th[e] case, simply precluded by the Due Process Clause from calling upon [the defendant] to answer to the more serious charge." *Id.* at 30. The Court concluded that the guilty plea "did not foreclose a subsequent challenge because * * * the defendant's right was 'the right not to be haled into court at all upon

the felony charge'" to which he had pleaded, and "'[t]he very initiation of proceedings against him . . . thus operated to deny him due process of law.'" *Broce*, 488 U.S. at 574-575 (quoting *Blackledge*, 417 U.S. at 30-31). The Court distinguished the defendant's claim from claims that it had previously held to be precluded by a guilty plea on the ground that none of the precluded claims "went to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, 417 U.S. at 30.

In *Menna*, the defendant pleaded guilty to a charge of refusing to answer grand-jury questions, after having already been subject to a contempt adjudication for the same conduct. 423 U.S. at 61; see *id.* at 62 n.2. On direct review, this Court summarily reversed a state appellate court's determination that the defendant's claim under the Double Jeopardy Clause had "been 'waived' by [his] counseled plea of guilty." *Id.* at 62. The Court explained, citing *Blackledge*, that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Ibid.* The Court "h[eld] that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.* at 63 n.2.

b. "Only a broad reading of *Blackledge* and *Menna*, unmoored from their factual and legal bases, would support the conclusion that the right 'not to be haled into court' extends to claims that criminal statutes are unconstitutional." *De Vaughn*, 694 F.3d at 1154.

The claims at issue in *Blackledge* and *Menna* challenged the prosecutorial act of filing the charges. Compare *Williams*, 341 U.S. at 66, 68-69, with *Menna*, 423 U.S. at 61-62, and *Blackledge*, 417 U.S. at 30-31. Each charge, "judged on its face," was asserted to be "one which the State [could] not constitutionally prosecute," *Menna*, 423 U.S. at 63 n.2, and thus "the very act of haling the defendants into court completed the constitutional violation" that was alleged, *United States* v. *Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015); see *Menna*, 423 U.S. at 62; *Blackledge*, 417 U.S. at 30. A double-jeopardy claim, as was at issue in *Menna*, is so intrinsically directed at "the very authority of the Government to hale [the defendant] into court to face trial," and so "completely independent of his guilt or innocence," that its denial may be appealed even before trial begins. *Abney*, 431 U.S. at 659-660. And the prosecutorial-vindictiveness claim at issue in *Blackledge*, while not subject to interlocutory appeal, see *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 264, 268 (1982) (per curiam), was closely akin to a double-jeopardy claim, see *Blackledge*, 417 U.S. at 31, and likewise challenged "the very initiation of the proceedings," *id.* at 30.

An attack on the constitutionality of the statute of conviction, in contrast, does not challenge "the very initiation of the proceedings"; it challenges the result of those proceedings—the entry of a conviction. At least in the absence of any binding decisional law dictating that a statute is unconstitutional on its face or as applied, the presumption that a statute is constitutional attaches to the initiation of a prosecution for the conduct it criminalizes. Cf., *e.g.*, *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979) (recognizing that police officers

can rely on the presumptive constitutionality of the statutes that they enforce). And when such charges are filed, the district court has authority to hear the case. See *Williams*, 341 U.S. at 66-69. A challenge to the constitutionality of the statute is therefore not a challenge to "the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge*, 417 U.S. at 30. It is instead a claim that, because the government "enforce[d] a proscription or penalty barred by the Constitution, *the resulting conviction or sentence* is * * * unlawful." *Montgomery*, 136 S. Ct. at 729-730 (emphasis added); see, *e.g.*, *id.* at 730 ("A conviction under an unconstitutional law * * * 'is illegal and void, and cannot be a legal cause of imprisonment.'") (quoting *Siebold*, 100 U.S. at 376-377).

The distinction is critical, because it is the conviction, not the filing of the charges, to which the defendant consents by pleading guilty. A defendant who is unlawfully brought before the court and forced to choose between a plea or a trial has not acquiesced in the lawfulness of the act that put him to that very choice. See *Broce*, 488 U.S. at 575 ("In *Blackledge*, the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all."); *Blackledge*, 417 U.S. at 30; cf. *Santobello* v. *New York*, 404 U.S. 257, 262 (1971) ("The plea must, of course, be voluntary."). Due to the invalidity of that act, "the court ha[s] no power to enter the conviction or impose the sentence," *Broce*, 488 U.S. at 569, inasmuch as it should not even have received the case. The situation is different, however, when the alleged defect is not with the act of initiating the proceedings, but instead with the substan-

tive law underlying the conviction. In that circumstance, "a federal court has power * * * to proceed to a determination on the merits," *Williams*, 341 U.S. at 68, and a defendant can fairly be held to his decision to accept, rather than contest, a judgment of legal guilt.

c. The opinions in *Ellis* v. *Dyson*, 421 U.S. 426 (1975), which were issued in the 18 months between *Blackledge* and *Menna*, demonstrate the Court's awareness of the relevant distinction between challenges to a statute of conviction and double-jeopardy or prosecutorial-vindictiveness claims. In *Ellis*, the defendants had pleaded nolo contendere to a criminal charge, but later filed a civil suit seeking, *inter alia*, to expunge their records of conviction on the ground that the underlying criminal law was unconstitutional. See *id.* at 428-430. The majority opinion left open whether such relief would be proper, see *id.* at 435, but Justice Powell addressed the issue in a dissenting opinion joined by Justice Stewart, the author of *Blackledge*, see *id.* at 437-452. In explaining his view that such relief would be unavailable, Justice Powell distinguished *Blackledge* on the ground that the "alleged constitutional infirmity" in a challenge to a substantive criminal law "lies not in the 'initiation of the proceedings' but in the eventual imposition of punishment that, assertedly, the State cannot constitutionally exact." *Id.* at 442 n.7 (quoting *Blackledge*, 417 U.S. at 30). Although Justice Powell was not speaking for the Court in *Ellis*, his separate writing shows that Members of the Court identified the distinction; illustrates Justice Powell's and Justice Stewart's understanding of Justice Stewart's majority opinion in *Blackledge*; and cautions against reading the six-Justice per curiam opinion in *Menna*, which both of those Justices joined half a year later, in an overly broad manner.

3. *Petitioner's reliance on* Blackledge *and* Menna *is misplaced*

Petitioner appears to recognize that *Blackledge* and *Menna* hold only "that where a defendant pleads guilty, but then asserts a right *that would have prevented the government from prosecuting him at all*—such as the right not to be vindictively prosecuted or to be put into double jeopardy—the assertion of that right is not inherently waived or foreclosed by the guilty plea." Br. 1 (emphasis added). He errs in his view that a "defendant's right *not to be convicted* pursuant to an unconstitutional statute plainly falls into this category," *ibid.* (emphasis added). Petitioner's asserted equivalence between a right to avoid having to plead at all and a right to avoid conviction is misconceived.

a. To the extent petitioner reads (*e.g.*, Br. 23) language from a footnote in *Menna* as limiting the preclusive effect of a guilty plea solely to issues of factual guilt, that limitation cannot be squared with this Court's later decision in *United States* v. *Broce*, *supra*.

In a footnote, *Menna* rejected the proposition that certain prior cases "st[ood] for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." 423 U.S. at 62 n.2 (citing *Tollett*, 411 U.S. 258, and cases cited therein). "The point of these cases," the Court stated, "is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Ibid.* (emphasis omitted). "In most cases," the Court continued, "factual guilt is a sufficient basis for the State's imposition of punishment," and a "guilty plea, therefore, simply renders irrelevant those constitutional viola-

tions not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *Ibid.* The Court contrasted such violations with the violation alleged in *Menna* itself, which suggested that "the State may not convict [the defendant] no matter how validly his factual guilt is established." *Id.* at 63 n.2.

Although the *Menna* footnote focused on factual guilt, "*Broce* made clear that a guilty plea admits more than simply the facts underlying guilt." *De Vaughn*, 694 F.3d at 1154. *Broce* explained that a "plea of guilty and the ensuing conviction comprehend all of the factual *and legal* elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." 488 U.S. at 569 (emphasis added); see *id.* at 570. *Broce*'s own discussion of the summary disposition in *Menna* accordingly omits any mention of the fact-focused discussion in the footnote—which, if read in the broad manner suggested by petitioner, would be at odds with other plenary decisions of this Court as well. See *id.* at 575; see, *e.g.*, *Alford*, 400 U.S. at 32 (guilty plea "usually subsumes both" the defendant's "admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind"); *Boykin*, 395 U.S. at 242 (guilty plea "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment").

The only decision of this Court that quotes the relevant portion of the *Menna* footnote is another pre-*Broce* decision, *Haring* v. *Prosise*, 462 U.S. 306 (1983). See *id.* at 321. In that case, the Court concluded that a

guilty plea does not foreclose a later civil claim for damages against law enforcement officers for Fourth Amendment violations committed while investigating the crime. See *id.* at 308, 323. The Court reasoned, in part, that the preclusive effect of a guilty plea with respect to a Fourth Amendment claim "does not rest on any notion of waiver, but rests on the simple fact that the claim is irrelevant to the constitutional validity of the conviction." *Id.* at 321. The Court did not consider whether, let alone hold that, a defendant who unconditionally concedes the substantive validity of a conviction in district court may nevertheless challenge that validity on appeal.

b. Petitioner also errs (*e.g.*, Br. 11, 31-32) in reading *Blackledge* to limit the preclusive effect of a guilty plea to claims of "procedural" defects that could "be 'cured' by the government" if it prosecuted the case in a different manner. Petitioner appears to derive that limitation from a distinction *Blackledge* drew between the prosecutorial-vindictiveness claim in that case and two types of claims it had previously held to be precluded by a guilty plea. The Court noted that whereas the prosecutorial-vindictiveness claim "went to the very power of the State to bring the defendant into court to answer the charge brought against him," defendants claiming coerced confessions "could surely have been brought to trial without the use of the allegedly coerced confessions," and "even a tainted indictment" returned by an improperly constituted grand jury "could have been 'cured' through a new indictment by a properly selected grand jury." 417 U.S. at 30.

That discussion, which identifies one salient feature of claims that challenge the commencement of proceed-

ings, does not suggest that a guilty plea *only* relinquishes claims that the government could have "cured" by initiating or conducting the proceedings in some other way. Indeed, any such interpretation is difficult to square with *Brady* v. *United States*, *supra*, which held that a guilty plea precludes a claim that the charging statute contained an unconstitutional death-penalty provision. See 397 U.S. at 746, 749-758; see also *Tollett*, 411 U.S. at 265-266 (discussing scope of *Brady*'s holding). That constitutional defect can only be "cured" through judicial invalidation of the unlawful provision. See *United States* v. *Jackson*, 390 U.S. 570, 591 (1968).

c. Finally, petitioner is mistaken in contending (Br. 27) that his broad reading of *Blackledge* and *Menna* is supported by this Court's decision in *Haynes*. *Haynes* involved a defendant's claim—which he raised before pleading guilty, then pressed in the court of appeals and this Court—that the charging statute violated his right against compelled self-incrimination. See 390 U.S. at 86-87 & nn.1-2. The government briefed the merits of the claim without arguing that it was precluded, see U.S. Br. at 4-32, *Haynes*, *supra* (No. 67-236), and the Court's decision included a one-sentence footnote, citing a single court of appeals decision, stating that the defendant's "plea of guilty did not, of course, waive his previous claim of the constitutional privilege." 390 U.S. at 87 n.2.

As petitioner appears to recognize by deploying it only in a supporting role, that one-sentence footnote (which would not even apply to the vagueness claim that petitioner failed to raise in district court) does not control this case. As a threshold matter, the footnote does not represent a considered determination of this Court following briefing and argument. See *McCutcheon* v.

FEC, 134 S. Ct. 1434, 1447 (2014) (plurality opinion) (reasoning, under the circumstances, that "this case cannot be resolved merely by pointing to three sentences in [a prior decision] that were written without the benefit of full briefing or argument on the issue") (citing *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 139-140 (1941); *Hohn* v. *United States*, 524 U.S. 236, 251 (1998)). It is thus entitled to little more weight than other cases in which no preclusion issue was considered. See Pet. Br. 28-29 (discussing *Loving* v. *Virginia*, 388 U.S. 1 (1967)). It also predates this Court's decisions recognizing the inherent preclusive effect of guilty pleas, none of which (including *Blackledge* and *Menna*) discusses or even cites *Haynes*. In fact, the *Haynes* footnote has not been cited by any subsequent decision of this Court.

In any event, *Haynes* at most reflects this Court's view, at that time, that a defendant who raised a constitutional claim before pleading guilty should not be deemed to have "waive[d]" it by pleading guilty, 390 U.S. at 87 n.2, and could raise it in an appellate forum, when the government did not object. Even assuming that practice were consistent with the later adoption of Rule 11(a)(2), see p. 29, *supra*, it would have no application where the government does seek to hold the defendant to the admissions inherent in his plea.

D. Petitioner Knowingly Waived His Appellate Rights During the Plea Colloquy

In this particular case, petitioner's relinquishment of his right to raise his constitutional claims on appeal is independently supported by the circumstances of his plea. Although petitioner correctly notes (Br. 18-20) that he did not waive his claims in his written plea

agreement, he was warned during the plea colloquy that his guilty plea would have that effect.

1. At the plea colloquy, petitioner explicitly agreed to "give up most of [his] rights to an appeal," subject only to particular "exceptions" that had been "mentioned" by the district court. J.A. 66. The court told petitioner that if he pleaded guilty, "there will probably be no appeal." J.A. 64. It explained that if he entered a guilty plea, he "would be generally giving up [his] rights to appeal," except "if [he] believe[d] that [his] guilty plea was somehow unlawful or involuntary or if there [were] some other fundamental defect in the[] guilty-plea proceedings." J.A. 63. It qualified that admonishment only by later adding that he "could also challenge [his] conviction based on newly discovered evidence or a claim of ineffective assistance of counsel." J.A. 64. It also subsequently described petitioner's written plea agreement as "giving up [his] right to appeal [his] conviction and challenge the sentence [the court] impose[d], unless the sentence exceeds the statutory maximum of the Guidelines Range or [he] claim[ed] newly discovered evidence or ineffective assistance of counsel." J.A. 76. Although that was not an accurate description of the plea agreement itself, which did not include a waiver of petitioner's right to appeal his conviction, it was congruent with the court's description of the default effect of his plea. At all relevant points, petitioner indicated that he understood the district court's warnings. See J.A. 63-64, 66, 77.

In the course of the colloquy, the district court identified no exception to the appeal bar that would allow for constitutional challenges to the statute of conviction. Petitioner now relies (Br. 45) on the exception for a claim

that the "guilty plea was somehow unlawful or involuntary or if there [were] some other fundamental defect in the[] guilty-plea proceedings," J.A. 63. But that exception expressly relates to claims of defects in the "proceedings," *ibid.*, not claims of defects in the substance of the charge. Only by narrowly focusing (Br. 45) on the first half of the sentence is petitioner able to suggest an interpretation under which *any* claim about the plea's "unlawful[ness]" would be allowed—an unreasonable interpretation that would swallow the rule that the court clearly announced.

Petitioner's pre-plea motions indicate that he was subjectively aware of the possibility of raising a substantive constitutional challenge to the statute under which he was charged. See pp. 4-5, *supra*. Yet at no point during the plea colloquy did he evince a belief that, notwithstanding his plea, he would be able to renew his constitutional claims on appeal, or to raise new ones (like his vagueness claim). Although petitioner notes (Br. 45) that "he was *pro se* when he pled guilty," his voluntary election to represent himself (with the assistance of standby counsel) does not negate the appeal limitations of which he was expressly informed. Cf. *Vonn*, 535 U.S. at 73 n.10 (defendant who chooses self-representation is held to plain-error review for failing to object to a Rule 11 error; "silence is one of the perils [the pro se defendant] assumes").

2. Petitioner contends (Br. 44-46) that the district court's warnings were so inadequate that his plea should be vacated on the ground that it was not knowing and intelligent. That contention was not raised in the petition, is outside the scope of the question presented, and accordingly does not provide a valid basis for disturbing the decision below. See, *e.g.*, *Wood* v. *Allen*, 558 U.S. 290,

304 (2010); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-538 (1992); Sup. Ct. R. 14.1(a).

In any event, petitioner's argument is not only factually unsupported, for the reasons described above, but also legally untenable. Petitioner identifies no constitutional principle, statute, rule, or judicial decision that requires that a defendant be subjectively aware of every potential appellate claim he is relinquishing in order for his guilty plea to be valid. That would effectively add a new, onerous, and unwarranted requirement to the plea-colloquy warnings listed in Rule 11(b). It would also provide an end-around to the guilty-plea-preclusion doctrine by allowing a defendant with any claim—even a claim of a sort that this Court has already directly held to be precluded by entry of a guilty plea—to undo his plea by denying subjective awareness of that doctrine.

A defendant who pleads guilty under a misapprehension about his appeal rights could potentially try to establish that his counsel was constitutionally deficient in failing to advise him about the procedural consequences of the plea and that he would not have entered the plea but for the deficient advice. See *Hill*, 474 U.S. at 59-60. He cannot, however, claim that he was entitled to a specific warning or that his plea was not knowing and intelligent. See *Ruiz*, 536 U.S. at 630 (knowing and intelligent plea "does not require complete knowledge of the relevant circumstances" and can be entered "despite various forms of misapprehension under which a defendant might labor").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 2017

APPENDIX

FEDERAL APPELLATE DECISIONS EXPRESSLY NOTING THE PRESERVATION OF CONSTITUTIONAL CHALLENGES TO A STATUTE OF CONVICTION THROUGH A CONDITIONAL PLEA

1. *United States* v. *Taylor*, No. 16-2542, 2017 WL 2543376, at *1 (8th Cir. June 13, 2017) (as-applied Second Amendment challenge to 18 U.S.C. 922(g)(1)).

2. *United States* v. *Anderson*, 771 F.3d 1064, 1066 (8th Cir. 2014) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 135 S. Ct. 1575 (2015).

3. *United States* v. *Cabrera-Gutierrez*, 756 F.3d 1125, 1128 (9th Cir.) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 135 S. Ct. 124 (2014).

4. *United States* v. *Shill*, 740 F.3d 1347, 1349, 1351, 1355 (9th Cir.) (vagueness challenge to 18 U.S.C. 2422(b)), cert. denied, 135 S. Ct. 147 (2014).

5. *United States* v. *Chovan*, 735 F.3d 1127, 1129-1131 (9th Cir. 2013) (facial and as-applied Second Amendment challenges to 18 U.S.C. 922(g)(9)), cert. denied, 135 S. Ct. 187 (2014).

6. *United States* v. *Chapman*, 666 F.3d 220, 224 (4th Cir. 2012) (as-applied Second Amendment challenge to 18 U.S.C. 922(g)(8)).

7. *United States* v. *Staten*, 666 F.3d 154, 157 (4th Cir. 2011) (as-applied Second Amendment challenge to 18 U.S.C. 922(g)(9)), cert. denied, 566 U.S. 950 (2012).

8. *United States* v. *Lucas*, 419 Fed. Appx. 690, 690-691 (8th Cir. 2011) (per curiam) (Commerce Clause, due process, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), vacated, 565 U.S. 1189 (2012).

9. *United States* v. *Portillo-Munoz*, 643 F.3d 437, 439, 442 (5th Cir. 2011) (Second Amendment challenge to 18 U.S.C. 922(g)(5)), cert. denied, 566 U.S. 963 (2012).

10. *United States* v. *Lowe*, 416 Fed. Appx. 579, 579-580 (8th Cir. 2011) (per curiam) (Commerce Clause, Tenth Amendment, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

11. *United States* v. *Leach*, 639 F.3d 769, 771 (7th Cir. 2011) (ex post facto challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

12. *United States* v. *Booker*, 644 F.3d 12, 15, 22 (1st Cir. 2011) (facial Second Amendment challenge to 18 U.S.C. 922(g)(9)), cert. denied, 565 U.S. 1204 (2012).

13. *United States* v. *Walker*, 411 Fed. Appx. 947, 948 (8th Cir.) (per curiam) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.* and 18 U.S.C. 2250), cert. denied, 565 U.S. 852 (2011).

14. *United States* v. *Curry*, 627 F.3d 312, 314 (8th Cir. 2010) (per curiam) (Commerce Clause, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), vacated, 565 U.S. 1189 (2012).

15. *United States* v. *Fuller*, 627 F.3d 499, 500-502, 508 (2d Cir. 2010) (Commerce Clause, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), vacated, 565 U.S. 1189 (2012).

16. *United States* v. *Begay*, 622 F.3d 1187, 1192-1193, 1198 (9th Cir. 2010) (ex post facto and due process challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 564 U.S. 1023 (2011).

17. *United States* v. *Sanders*, 622 F.3d 779, 782 (7th Cir. 2010) (Commerce Clause challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 562 U.S. 1193 (2011).

18. *United States* v. *Huls*, 353 Fed. Appx. 176, 177 (10th Cir. 2009) (Commerce Clause, Tenth Amendment, and due process challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

19. *United States* v. *Zuniga*, 579 F.3d 845, 847-848 (8th Cir. 2009) (per curiam) (Commerce Clause, Tenth Amendment, ex post facto, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 560 U.S. 954 (2010).

20. *United States* v. *Whaley*, 577 F.3d 254, 256, 258, 261, 263 (5th Cir. 2009) (Commerce Clause, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

21. *United States* v. *Ambert*, 561 F.3d 1202, 1204-1205, 1207-1210, 1212 (11th Cir. 2009) (Commerce Clause, ex post facto, due process, nondelegation, and right-to-travel challenge to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

22. *United States* v. *Paull*, 551 F.3d 516, 519-520 (6th Cir.) (vagueness challenge to Child Pornography Protection Act, 18 U.S.C. 2252 *et seq.*), cert. denied, 558 U.S. 827 (2009).

23. *United States* v. *Hinckley*, 550 F.3d 926, 927-928 (10th Cir. 2008) (Commerce Clause, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*), cert. denied, 556 U.S. 1240 (2009).

24. *United States* v. *Madera*, 528 F.3d 852, 854 (11th Cir. 2008) (per curiam) (Commerce Clause, ex post facto, due process, and nondelegation challenges to the Sex Offender Registration and Notification Act, 42 U.S.C. 16901 *et seq.*).

25. *United States* v. *Bly*, 510 F.3d 453, 455, 457 (4th Cir. 2007) (First Amendment challenge to prosecution under 18 U.S.C. 876(b) for particular statements).

26. *United States* v. *Latu*, 479 F.3d 1153, 1154-1155 (9th Cir.) (as-applied Commerce Clause challenge to 18 U.S.C. 922(g)(5)), cert. denied, 552 U.S. 868 (2007).

27. *United States* v. *Earle*, 216 Fed. Appx. 824, 824-825 (10th Cir. 2007) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

28. *United States* v. *Cramer*, 213 Fed. Appx. 138, 139-140 (3d Cir.) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*), cert. denied, 550 U.S. 949 (2007).

29. *United States* v. *Wingfield*, 206 Fed. Appx. 208, 209-210 (3d Cir. 2006) (facial Commerce Clause challenge to 18 U.S.C. 922(g)), cert. denied, 550 U.S. 970 (2007).

30. *United States* v. *Pountney*, 191 Fed. Appx. 679, 680-681 (10th Cir. 2006) (facial and as-applied Commerce Clause challenges to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

31. *United States* v. *Sullivan*, 451 F.3d 884, 886 (D.C. Cir. 2006) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2252A(a)(5)(B)).

32. *United States* v. *Patton*, 451 F.3d 615, 619-620 (10th Cir. 2006) (Commerce Clause and due process challenges to 18 U.S.C. 931), cert. denied, 549 U.S. 1213 (2007).

33. *United States* v. *Grimmett*, 439 F.3d 1263, 1266-1267, 1271 (10th Cir. 2006) (facial and as-applied Commerce Clause challenges to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

34. *United States* v. *Wilson*, 118 Fed. Appx. 974, 975 (7th Cir. 2004) (Commerce Clause, Tenth Amendment, and equal-protection challenges to 18 U.S.C. 922(g)(1)), cert. denied, 545 U.S. 1122 (2005).

35. *United States* v. *Bredimus*, 352 F.3d 200, 203 & n.4, 208 (5th Cir. 2003) (Commerce Clause, First Amendment, Fifth Amendment, and Eighth Amendment challenges to 18 U.S.C. 2423(b)), cert. denied, 541 U.S. 1044 (2004).

36. *United States* v. *Bournes*, 339 F.3d 396, 396 (6th Cir. 2003) (Second Amendment and due process challenges to 26 U.S.C. 5861(d) and 18 U.S.C. 922(*o*)), cert. denied, 540 U.S. 1113 (2004).

37. *United States* v. *Moreno-Morillo*, 334 F.3d 819, 824-826 (9th Cir. 2003) (Commerce Clause challenge to the Maritime Drug Law Enforcement Act, Pub. L. No. 96-350, 94 Stat. 1159), cert. denied, 540 U.S. 1156 (2004).

38. *United States* v. *Pritchett*, 327 F.3d 1183, 1184-1185 (11th Cir.) (Commerce Clause challenge to 18 U.S.C. 922(j)), cert. denied, 540 U.S. 893 (2003).

39. *United States* v. *McCoy*, 323 F.3d 1114, 1115 (9th Cir. 2003) (as-applied Commerce Clause challenge to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*).

40. *United States* v. *Ballinger*, 312 F.3d 1264, 1265-1266, 1268 (11th Cir. 2002) (facial and as-applied Commerce Clause challenges to 18 U.S.C. 247), rev'd on reh'g en banc, 395 F.3d 1218 (11th Cir.), cert. denied, 546 U.S. 829 (2005).

41. *United States* v. *Lemons*, 302 F.3d 769, 770 (7th Cir.) (Commerce Clause challenge to 18 U.S.C. 922(g)(1)), cert. denied, 537 U.S. 1049 (2002).

42. *United States* v. *Warren*, 51 Fed. Appx. 843, 844 (10th Cir. 2002) (Commerce Clause challenge to 18 U.S.C. 922(g)(1)).

43. *United States* v. *Ramos*, 47 Fed. Appx. 471, 472 (9th Cir. 2002) (Commerce Clause and due process challenges to the Maritime Drug Law Enforcement Act, Pub. L. No. 96-350, 94 Stat. 1159), cert. denied, 540 U.S. 826 (2003).

44. *United States* v. *Hardman*, 297 F.3d 1116, 1119 (10th Cir. 2002) (en banc) (Free Exercise Clause and Establishment Clause challenges to the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*).

45. *United States* v. *Spruill*, 292 F.3d 207, 208, 211-212, 215 (5th Cir. 2002) (Second Amendment and Fifth Amendment challenges to 18 U.S.C. 922(g)(8)).

46. *United States* v. *Napier*, 233 F.3d 394, 396-397 (6th Cir. 2000) (Commerce Clause, Second Amendment, and Fifth Amendment challenges to 18 U.S.C. 922(g)(8)).

47. *United States* v. *Matthews*, 209 F.3d 338, 341 (4th Cir.) (as-applied First Amendment and facial due process challenges to the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. 2251 *et seq.*, cert. denied, 531 U.S. 910 (2000).

48. *United States* v. *Kovach*, 208 F.3d 1215, 1216 (10th Cir. 2000) (Commerce Clause challenge to 18 U.S.C. 513(a)).

49. *United States* v. *Beavers*, 206 F.3d 706, 708 (6th Cir.) (due process challenge to 18 U.S.C. 922(g)(9)), cert. denied, 529 U.S. 1121 (2000).

50. *United States* v. *Lue*, 134 F.3d 79, 80-81 (2d Cir. 1998) (Article I, Tenth Amendment, and equal protection challenges to the Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. 1203).

51. *United States* v. *Hampshire*, 95 F.3d 999, 1001 (10th Cir. 1996) (Commerce Clause and Tenth Amendment challenges to the Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403), cert. denied, 519 U.S. 1084 (1997).

52. *United States* v. *Wall*, 92 F.3d 1444, 1445-1446 (6th Cir. 1996) (Commerce Clause challenge to 18 U.S.C. 1955), cert. denied, 519 U.S. 1059 (1997).

53. *United States* v. *Kirk*, 70 F.3d 791, 793 (5th Cir. 1995) (Commerce Clause challenge to 18 U.S.C. 922(*o*)), cert. denied, 522 U.S. 808 (1997).

54. *United States* v. *Bohai Trading Co.*, 45 F.3d 577, 578-579 (1st Cir. 1995) (vagueness challenge to 18 U.S.C. 2320(a)).

55. *United States* v. *Guthrie*, 50 F.3d 936, 937, 940 (11th Cir. 1995) (nondelegation challenge to Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*).

56. *United States* v. *Mishra*, 979 F.2d 301, 302 (3d Cir. 1992) (vagueness and due process challenges to Drug Paraphernalia Act, 21 U.S.C. 863).